

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROGER E. STIER and JOHN ZANONE

Appeal No. 2004-0736
Application No. 09/871,334

HEARD: May 20, 2004

Before GARRIS, WALTZ, and KRATZ, Administrative Patent Judges.
WALTZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the primary examiner's refusal to allow claims 1 through 8, the only claims pending in this application, as amended subsequent to the final rejection (see the amendment dated June 10, 2002, Paper No. 6, entered as per the Advisory Action dated June 19, 2002, Paper No. 7). We have jurisdiction pursuant to 35 U.S.C. § 134.

According to appellants, the invention is directed to an edible tablet comprising freeze-dried flavoring agents from natural fruits, herbs, vegetables, spices, extracts and combinations

thereof, having an average particle size of up to about 3 millimeters (mm) and a moisture content of up to about 75% by weight, which flavoring agents provide more intense flavor and increased stability (Brief, pages 1-2). Appellants state that all of the claims stand or fall together (Brief, page 2). Therefore, pursuant to the provisions of 37 CFR § 1.192(c)(7)(2000), we select independent claim 1 as the broadest claim representative of the invention and decide the ground of rejection in this appeal on the basis of this claim alone. Claim 1 is reproduced below:

1. An edible tablet comprising a freeze-dried flavoring agent or an active component thereof contained within the tablet having an average particle size of up to about 3 millimeters and a moisture content of up to about 75% by weight of the flavoring agent components, wherein the flavoring agent or active component thereof comprises freeze-dried freshly harvested fruit, herb, vegetable, spice, extract thereof or combinations thereof.

The examiner has relied upon the following references as evidence of obviousness:

Song et al. (Song)	5,128,155	Jul. 07, 1992
Cherukuri et al. (Cherukuri)	5,284,659	Feb. 08, 1994
Engel et al. (Engel)	0 743 062 A1	Nov. 20, 1996
(published European Patent Application) ¹		
Stahl	WO 99/44436	Sep. 10, 1999
(published International Application)		

¹We rely upon and cite from a full English translation of this document, previously made of record.

Claims 1-8 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Stahl in view of Cherukuri, Song and Engel (Answer, page 3).² We *affirm* the rejection on appeal essentially for the reasons stated in the Answer and those reasons set forth below.

OPINION

The examiner finds that Stahl discloses edible compositions comprising a freeze-dried flavoring agent, which may be ground to a particle size of up to 3 mm, with a moisture content of less than 75% by weight (Answer, page 4). The examiner finds that Stahl teaches a flavoring agent that is natural or synthetic and made from plants, fruits, vegetables, herbs or extracts, including many of the same flavoring agents as disclosed and claimed by appellants (Answer, pages 4-5). The examiner recognizes that the flavoring agents of Stahl are coated around the tablet or core material but there is no teaching that these flavoring agents are contained

²The final rejection of claims 1-8 under the second paragraph of section 112 has been withdrawn in view of the amendment subsequent to the final rejection (see the amendment of Paper No. 6, entered and indicated as overcoming the § 112, ¶2 rejection as noted in the Advisory Action of Paper No. 7; see also the Brief, page 1, ¶4).

within the tablet (Answer, page 5).³ The examiner therefore applies Cherukuri and Song to show that incorporating flavors into a tablet was well known in this art (Answer, pages 5-6). The examiner applies Engel to show the advantages of using "freshly harvested" flavoring agents in this art (Answer, page 6). From these findings, the examiner concludes that it would have been obvious to use the flavoring agents of Stahl within the tablet, as taught by Cherukuri and Song, and to use freshly harvested flavoring agents for the advantages taught by Engel (Answer, page 6). We agree.

Appellants argue that Stahl does not teach or suggest that the flavoring agent be contained in the tablet and that the agent be from freshly harvested ingredients (Brief, page 5). We agree with appellants' argument but note that the other references applied in the rejection on appeal supply these missing limitations (see the examiner's findings discussed above). Furthermore, we note that "freshly harvested" is not defined nor limited in any way in the specification. Giving this term its broadest reasonable interpretation as it would have been understood by one of ordinary

³Stahl describes the core of chewing gum as a "tablet" (page 2, l. 1), which is then coated with a flavoring agent (e.g., page 11, ll. 1-3).

skill in this art, especially in view of the absence of definitions or guidelines in the specification, we determine no difference between the "freshly harvested" fruits and plants of appellants' claim 1 and the fruits and plants disclosed by Stahl. See *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). Additionally, we note that Stahl teaches use of small pieces of the fruit or seed in the flavoring coating (page 7), and the advantages of using fruit and/or seeds as fresh as possible would have been obvious to one of ordinary skill in this art.

Appellants argue that Cherukuri and Song provide no teaching or suggestion of the use of freeze-dried flavoring agents in a tablet (Brief, pages 5-7). This argument is not persuasive. As discussed above, Stahl teaches incorporation of freeze-dried flavoring agents in a coating surrounding the tablet or core of gum material to produce a better stability of the flavor agent as well as an increased effect of the flavor (abstract; page 2, ll. 14-18; and page 14, ll. 21-28). Claim 1 on appeal uses the transition term "comprising," thus the claim is open to include the coating of Stahl, as long as flavoring agents are also incorporated within the tablet. See *Vehicular Techs. v. Titan Wheel Int'l, Inc.*, 212 F.3d 1377, 1383, 54 USPQ2d 1841, 1845 (Fed. Cir. 2000). Appellants disclose that the edible tablet of the present invention can

include a coating of freeze-dried flavoring agent to increase the stability (specification, page 12, ll. 5-12). Accordingly, the principle difference between the tablet of Stahl and the claimed edible tablet is that there is additional freeze-dried flavoring agent *within* the tablet. We agree with the examiner that both Cherukuri and Song teach the incorporation of flavoring agents *within* a tablet. Appellants do not dispute this finding but argue that Cherukuri and Song are not directed to *freeze-dried* flavoring agents (Brief, pages 5-7; Reply Brief, pages 1-2). However, on this record Stahl has taught that both conventional flavoring agents and freeze-dried flavoring agents may be used in the flavoring process, although freeze-dried flavoring agents are preferred (page 7, l. 6). Appellants have not provided any evidence on this record that one of ordinary skill in this art would have considered freeze-dried flavoring agents different in use that conventional flavoring agents. See *In re Scarborough*, 500 F.2d 560, 566, 182 USPQ 298, 302 (CCPA 1974) (Attorney's arguments are generally held to be insufficient to take the place of evidence or expert testimony).

Appellants argue that Cherukuri teaches in the art that one cannot merely substitute different types of flavorings, citing col. 1, ll. 15-20 (Brief, pages 7 and 10; Reply Brief, pages 1-2). This

argument is not persuasive. As noted above, Stahl suggests the substitution of conventional and freeze-dried flavoring agents. Furthermore, Cherukuri only teaches that different classes of flavor delivery systems have different characteristics (col. 1, ll. 15-20). Appellants have not established that the systems of Cherukuri and Song belong to different classes (i.e., liquid, emulsion, paste or solid).

Appellants argue that Engle provides "absolutely nothing to the art of flavoring agents" (Brief, page 8, footnote omitted). However, appellants have not disputed the advantages taught by Engle for the use of freshly harvested plant material in flavorings (Answer, page 9). Therefore appellants' argument is not persuasive. Additionally, we note that Stahl teaches a desire for a more intense flavor and stability of the agent, which may be attributed to the more or less intact cells of the fruit or herb (page 6, ll. 25-30), indicating a preference for freshly harvested fruit and herbs.

For the foregoing reasons, we determine that the examiner has established a *prima facie* case of obviousness in view of the reference evidence. Based on the totality of the record, including due consideration of appellants' arguments, we determine that the preponderance of evidence weighs most heavily in favor of

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obviousness within the meaning of section 103(a). Accordingly, we affirm the examiner's rejection of claims 1-8 under 35 U.S.C. § 103(a) over Stahl in view of Cherukuri, Song and Engel.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

BRADLEY R. GARRIS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
THOMAS A. WALTZ)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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PETER F. KRATZ)	
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